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No. 97-679

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP.,
Petitioner,

v.

CENTRAL OFFICE TELEPHONE, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF PETITIONER AT&T CORP.

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January 23, 1998

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QUESTION PRESENTED

Whether, consistent with a line of decisions from this Court extending from *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912), and *Davis* v. *Cornwell*, 264 U.S. 560 (1924), to *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), the federal filed tariff requirements of Section 203 of the Communications Act of 1934 preempt state law claims that a customer of a regulated common carrier is entitled to better, costlier, and more valuable services than required by the terms of the governing tariff, and received by similarly situated customers?

LIST OF PARTIES AND AFFILIATES

The parties listed on the caption were the only parties to the proceedings below. American Telephone and Telegraph Co. has, since the inception of this case, changed its name to AT&T Corp.

Pursuant to Supreme Court Rule 29.6, AT&T Corp. declares that it has no parent. AT&T Corp. has an equity interest in the following publicly traded companies:

LIN Television Corporation;
American Mobile Satellite Corporation;
PriCellular, Inc.;
General Magic, Inc.;
Novell, Inc.;
Lanser Wireless Inc. (Canada); and
SmartTone Telecommunications Holdings Ltd. (Hong Kong).

AT&T Corp. owns an interest in the following non-publicly traded company, which has public debt outstanding:

AT&T Credit Holdings, Inc.

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BRIEF FOR PETITIONER AT&T CORP.

OPINIONS BELOW

The opinion of the court of appeals (Appendix to Petition for Certiorari ("Petn.") 1a-30a) is reported at 108 F.3d 981. The order of the court of appeals denying AT&T Corp.'s petition for rehearing and suggestion for rehearing en banc (Petn. 49a) is unreported. The order of the United States District Court for the District of Oregon entering judgment on a jury verdict for Central Office Telephone, Inc., and dismissing AT&T Corp.'s counterclaims (Petn. 48a) is unreported. The decision and opinion of the district court amending its judgment (Petn. 31a-47a) is also unreported.

JURISDICTION

The order of the court of appeals denying AT&T Corp.'s petition for rehearing was entered on July 18, 1997. AT&T Corp. filed its petition for a writ of certiorari on October 16, 1997. This Court granted AT&T Corp.'s petition on December 12, 1997. Joint Appendix ("J.A.") 79. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of Sections 201-208 of the Communications Act of 1934, 47 U.S.C. §§ 201-208, are reproduced in the Appendix ("App.") to this brief. Relevant portions of AT&T Tariff F.C.C. No. 1 are also reproduced in the Appendix.

STATEMENT OF THE CASE

Respondent Central Office Telephone, Inc. ("COT") is one of the nation's many "resellers" of long distance telephone services. Such firms purchase volume discounted or other long distance services that are designed for large customers and then "resell" these services at marked-up rates to smaller customers.

Between 1990 and 1992, COT purchased a long distance service offered by petitioner AT&T that is called Software Defined Network ("SDN"). SDN had formerly been used only by large corporate customers, but COT is one of some 100 resellers who ordered SDN shortly after AT&T's tariff was amended to offer a new feature (switched access) that enabled SDN to be used by resellers. Because of the complexity of this new feature and the fact that demand for it radically exceeded expectations, orders for this feature were initially not provisioned and billed nearly as rapidly or as

accurately as other AT&T services had been -- or as SDN orders were thereafter. These problems affected not only COT, but also the other reseller and non-reseller customers that ordered this new SDN feature during this period.

COT made no claim that the services it received violated any provision of AT&T's tariff, unlawfully discriminated against COT or other resellers, or violated any other provision of the Communications Act. Rather, COT asserted that AT&T's sales representatives had impliedly promised COT that it would receive (at no extra charge) faster, better, and immensely more valuable services than were required by AT&T's tariff and the Communications Act -- or were received by any similarly-situated customers -- and that these claims stated causes of action under state contract and tort law.

In the trial court, these claims were submitted to a jury, over AT&T's objection that COT was claiming a right to the very untariffed preferences and privileges affecting rates that Section 203(c) of the Communications Act and a century of this Court's decisions prohibit. The jury found that AT&T's representatives had made and breached the state-law contract asserted by COT, and the district court awarded COT a "lost profits" judgment of $1.154 million and denied AT&T's counterclaim to recover amounts that the tariff required COT to pay for the services it received, but that COT had refused to pay. Petn. 46a-48a.

A divided panel of the Ninth Circuit affirmed this judgment over Judge Brunetti's dissent. The majority held that the tariff filing requirements apply only to rates and not to terms and conditions affecting rates. Petn. 10a. It also stated that AT&T's tariff had not "covered" two features of the alleged extra-tariff agreement and thus that COT could have

maintained these claims even if the filed tariff requirements were not limited to rates. Petn. 11a. Although the errors in the Ninth Circuit majority's holding can be demonstrated from this Court's prior decisions, AT&T will place the issues in their full context by summarizing the statutory, regulatory, and factual background to this case.

A. Statutory and Regulatory Framework.

AT&T is a "common carrier" (47 U.S.C. § 153(10)) that is subject to the requirements of Title II of the Communications Act of 1934, 47 U.S.C. §§ 201 *et seq.* The provisions of Title II both impose substantive duties on all common carriers and provide procedures and remedies for enforcing these duties.

Section 201 requires carriers to provide communications service to any person "upon reasonable request" under "charges, practices, classifications, and regulations" that are "just and reasonable." 47 U.S.C. §§ 201(a) & (b). Section 202(a) prohibits carriers from making "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services" in providing "like communications services" or from giving, "directly or indirectly," any "undue or unreasonable preference or advantage" to any person. 47 U.S.C. § 202(a).

Section 203 imposes the filed tariff requirements. It requires that common carriers file "schedules" (commonly referred to as "tariffs") containing all their "charges" for interstate services and all "classifications, practices and regulations affecting such charges," and it prohibits any form of evasion of this requirement. 47 U.S.C. § 203.

The Act also establishes a detailed scheme for enforcing the foregoing requirements. Section 204 provides that carriers

may alter the terms of their tariffs by filing tariff revisions that become effective following a notice period (unless suspended for a maximum period of five months). 47 U.S.C. § 204. After tariff provisions become effective, Section 205 authorizes the Federal Communications Commission ("FCC") to prescribe those changes in the tariffs that are required to conform to the Act. 47 U.S.C. § 205. In addition, private parties are entitled to bring federal law actions for damages by alleging that a tariff provision violates the Act, that a carrier has violated its tariff, or that a carrier has engaged in unjust or unreasonable discrimination or practices in implementing its tariff. 47 U.S.C. §§ 206-208. Complaints for damages can be brought at the FCC or (subject to primary jurisdiction referrals) in a federal district court. 47 U.S.C. §§ 207-208.

Under longstanding FCC regulations, firms that wish to resell long distance services have a right to obtain them under the same rates, terms, and conditions as apply to other customers.[1] The FCC has concluded that the availability of service to resellers will tend to assure that any volume discounts reflect those actual cost savings that carriers enjoy when they offer services in bulk[2] and that orders from resellers will cause carriers to "discontinue non-cost-based volume discounts."[3]

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[1] *See generally Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261, 283-84 (1976), *aff'd sub nom., American Tel. & Tel. Co.* v. *FCC*, 572 F.2d 17 (2d Cir. 1977); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 F.C.C.2d 167, 173-74 (1980).

[2] *See id.*, 83 F.C.C.2d at 168-69.

[3] *In re MCI Telecom. Corp.*, 81 F.C.C.2d 568, 573 (1980).

Correlatively, the FCC has made it explicit that a carrier's sole duty is to make service generally available to all customers (resale and non-resale) at identical rates, terms, and conditions that satisfy the requirements of the Act. So long as a service is "generally available," there is no requirement that any service be "generally useful" to resellers,[4] that carriers "actively assist resellers,"[5] or that carriers "ensure the success of resellers."[6] Carriers remain free to develop and offer tariffed services that reflect the unique needs of specific classes of customers.

B. AT&T's Software Defined Network Service.

Software Defined Network ("SDN") is a specialized long-distance service that AT&T developed to meet the needs of large enterprises that have offices in multiple locations. ER[7] 2521-22. Among other things, SDN establishes a "virtual private network" that allows employees in different locations to communicate easily and effectively. *See* ER 373, 1428, 2529, 3526, 3545. For example, if SDN were used by a law firm with offices in both Chicago and Washington, a lawyer in the Chicago office could call a lawyer in the Washington office by merely dialing his or her 4-digit extension.

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[4] *AT&T Communications--Revisions to Tariff F.C.C. No. 12*, 6 F.C.C.R. 7039, 7051 (1991), *aff'd sub nom., Competitive Telecom. Ass'n* v. *FCC*, 998 F.2d 1058 (D.C. Cir. 1993).

[5] *Id.*, 6 F.C.C.R. at 7055.

[6] *In re MCI*, 81 F.C.C.2d at 573.

[7] Citations to the Excerpts of Record on appeal are abbreviated "ER __."

Establishing an SDN network for an individual customer is a highly complex and expensive process.[8] ER 699-706. Once an initial SDN network is established, the customer can place orders to add new locations or drop existing locations. ER 389-90. Thus, if the law firm mentioned in the previous example were to open a new office in New York, then AT&T could add that location at the firm's request. This would permit lawyers in Washington, Chicago, and New York to communicate across offices simply by dialing a four-digit extension.

In addition to establishing rates, AT&T's SDN tariff defines AT&T's duties and responsibilities in provisioning (*i.e.*, filling) orders for services as well as in billing them. The tariff provides that "when an order for service is placed," AT&T will "establish and confirm" a due date for provisioning that order. App. 19a (§ 2.5.10). The tariff states that AT&T will "make every reasonable effort" to provision service by the due date, but states that "in some cases a delay in the installation may be unavoidable." App. 20a (§ 2.5.10.B). The tariff further provides that "if an order is delayed beyond its due date for more than 45 cumulated calendar days and such delay is not requested or caused by the Customer, the Customer may cancel the order without penalty or payment of nonrecurring charges." *Id.*

As to billing, AT&T's tariff does not require that bills be issued at any particular time after service is rendered. With

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[8] The SDN tariff imposes a substantial one-time installation charge (that is waived under the tariff only if the customer makes a multi-year commitment and agrees to pay the unamortized portion of the charges in the event of early termination). *See* App. 26a (§ 6.4.1).

one exception that is not here relevant,[9] the tariff also provides that the customer is responsible for payment of all the tariffed charges on its network when the bill is issued and that AT&T "will not allocate usage or . . . charges" among the locations on the customer's network and "is not responsible for the way that the Customer may allocate usage or charges." App. 24a (§ 6.2.4).

AT&T has implemented these tariff billing provisions by giving SDN customers the option to elect to receive bills in one of two different formats: "network billing"[10] or "multilocation billing."[11] ER 370, 414, 616-21, 1430-31. Neither of these options is described in the tariff, for no separate charge is imposed for either option. Further, under the tariff, the choice between the options cannot either affect the customer's responsibility to pay the tariffed charges or constitute AT&T's allocation of charges or usage among

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[9] The exception is called "Location Account Billing Option" ("LABO"), and it applies only to SDN services obtained by a corporation on behalf of independently owned franchisees. Under LABO, AT&T sends bills directly to each network location at the applicable discounted tariff rates, and each location account is solely responsible for payment of its charges. App. 24a (§ 6.2.4). Because LABO alters the responsibility for payment of the bills, AT&T's tariff provides that under LABO -- unlike the network billing and multilocation billing described below -- AT&T is responsible for allocation of charges. *Id.*

[10] In network billing, AT&T prepares a single bill that applies the tariffed rate (with applicable discounts) to all the usage originating at all the customer's locations. The customer can then use the information to allocate charges among locations as it sees fit. ER 1430-31.

[11] In multilocation billing, AT&T prepares bills that reflect each location's usage at the discounted tariffed rate plus a markup that reflects some or all of the applicable volume discount, as designated by the customer. ER 370, 414, 616-21.

locations. ER 369-70; App. 24a (§ 6.2.4). Rather, they are different methods of apprising the customer of the total charges it owes and of providing information to enable the customer to allocate charges among locations. ER 1430-31.

AT&T's SDN tariff also contains a general limitation on AT&T's liability for service-related claims. For "nonwillful" violations, AT&T's liability is limited to a proportionate share of the applicable service charges for the affected period, and this amount is in addition to any credits for service outages. App. 10a (§ 2.3.1.A). For violations that constitute "willful misconduct," there is no limitation on AT&T's liability. *Id.*

C. The Development Of Switched Access SDN And The Emergence Of Switchless Resellers.

Prior to late 1989, SDN customer locations had to be connected to AT&T's network over special "dedicated access" lines. ER 2521-22. These are essentially direct "pipes" from a location's telephone system to AT&T's long-distance network, so long-distance calls carried over these lines are not sorted and routed by the switches of the local exchange carrier that serves that area. ER 2539-40.

In 1989, AT&T developed the capability to allow customers to use ordinary ("switched access") telephone lines to hook up locations to their SDN networks, and AT&T revised its tariff to offer this feature. ER 385, 1181-85, 2522. This change was designed to address the needs of corporations that had some individual locations which did not generate enough long-distance calling to make dedicated access economic. *See* ER 2522.

Provisioning of switched access connections to SDN networks proved to be far more complicated than the provisioning of dedicated access connections. Filling each switched access order required making coordinated physical changes not just in AT&T's network, but also in the separate switches of the local exchange carrier that served the location in question (*e.g.*, Bell Atlantic in Washington). *See* ER 794-804. In 1989, there were no established procedures to perform these steps. ER 874-76, 2692-93, 2707-09, 2720-21. Because SDN had been designed for use by corporate customers that have stable sets of locations, AT&T had expected that there would be relatively few orders for switched access connections to SDN networks. ER 2695-96.

But the 1989 tariff revisions had an unanticipated effect. ER 2695-96, 2740-41. They led to SDN orders by a new class of long distance service resellers that had not previously existed -- "switchless" resellers who own or operate no facilities of their own. ER 805-06, 1181-82. By contrast, the resellers who had existed prior to 1989 were all firms (*e.g.*, predecessors to today's MCI, Sprint, and WorldComm) who owned some long distance switches or other facilities. ER 1180-81. These "switch-based" resellers provided services by obtaining the local telephone facilities required to hook up their customers to their own switches and by subscribing to AT&T services solely to fill in gaps in their network or to terminate calls to areas they did not serve. *See* ER 1180-82.

Switchless resellers operate differently. They are pure arbitrageurs who own no facilities and make no arrangements for any aspect of service. *See id.* Rather, they subscribe to services like SDN, sign up customers, and then place orders telling AT&T to treat their customers as if they were new locations on a corporate SDN network. *See* ER 363-64, 2496. In this regard, the switchless resellers were not attracted to

SDN by the features designed for corporate customers (like 4-digit calling). ER 2525. Rather, they were attracted because SDN rates for other calls using switched access were then lower than those for other discounted services and because they believed that they could profitably serve smaller customers for whom these SDN rates (with the resellers' mark-up) would be attractive. ER 386-87, 1202, 1211.

The net result was that, although AT&T had expected only a relatively small number of switched access SDN orders, there was a tremendous volume of these orders that grew explosively throughout 1990. ER 2695-96, 2740-41. There had been no switchless or other resellers of SDN prior to the 1989 tariff change. But by October 1990, there were approximately 100 switchless SDN resellers. ER 2347. Further, after an extraordinary and unprecedented volume of orders for switched access SDN connections was placed in the fourth quarter of 1989 -- *i.e.*, 692 orders (ER 2785-86) -- that number grew exponentially in succeeding quarters until there were over 13,000 switched access orders placed in the third quarter of 1990. ER 2696, 2785-87.

AT&T and the local exchange carriers did not have the processes in place to provision these volumes of switched access orders as rapidly as dedicated access orders were then being filled or as quickly as AT&T personnel had previously predicted switched access orders would be filled. ER 874-76, 2692-94, 2707-09, 2720-21. Further, the provisioning process was slowed by the fact that many of the new switchless resellers had little or no experience in telecommunications and did not collect the correct information from their customers. As a result, single orders for individual locations often had to be run through the process multiple times, clogging the overtaxed systems further. ER 1288, 1714, 2530-31, 2695.

Related billing problems also emerged.[12] The provisioning and billing problems affected all SDN customers who placed switched access orders. ER 917, 2616, 2625. In addition, the switchless resellers initially dealt with the members of AT&T's regional sales force that served large corporate customers and who lacked both experience in the different needs of resellers and the capacity to receive and process large volumes of orders to "add" or "delete" locations from SDN networks. ER 792-94, 2504.

After these problems emerged, AT&T took extensive steps to improve its provisioning and billing of switched access SDN operations. For example, AT&T centralized the function of processing SDN orders from resellers. It transferred those tasks from the regional AT&T sales offices which had no experience with the special needs of resellers to the AT&T division which had successfully handled orders from other resellers of AT&T services for a decade. ER 2782, 2495, 2692-97. This division developed numerous computer systems for SDN orders, created new provisioning systems, recruited key personnel from other AT&T business groups, established data protocols with local exchange carriers, and established time goals for each step of the process. ER 2310-16, 2771-83. To address the problems created by resellers' submission of incorrect information, this division established revised order forms, adopted special instructions for resellers, and trained staff to assist the resellers. ER 1988, 2313, 2696, 2699-2701, 2777-84. By late 1991 and early 1992, AT&T had cleared out

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[12] The principal SDN billing problem was "suppressed billing," which occurs when a location is on the SDN network but there is not yet a mechanism in place to match its phone usage to a billing record. ER 2829-30. The billing system then has nowhere to register the calls and lumps them in an "unbilled" toll group until a proper mechanism is set up, at which time the customer is billed for its prior calls. *Id.*

its backlog of orders and was provisioning the huge volumes of new switched access as rapidly as it had previously predicted it could. *See* ER 1297-1300, 2822. It also had eliminated the principal causes of the billing delays and problems. *See* ER 2342, 2511.

During the first half of 1990, AT&T also considered a number of tariff revisions and operational changes to address the problems that switchless SDN resellers had raised. *See* ER 1315-40. In the end, AT&T rejected the extreme proposals that it should "kill arbitrage" by filing tariff revisions (as MCI had done for its competing services) establishing higher rates for calls originating at locations that were not affiliated with the customers of the service. ER 549-50. But AT&T adopted measures designed to protect itself against those switchless resellers who were illicitly passing themselves off as part of AT&T and were causing losses to AT&T and problems for their own customers by not paying SDN bills. *See* ER 3739-41. Some AT&T personnel had referred to such resellers in derogatory terms in internal memoranda. *See* ER 3405.

D. Central Office Telephone.

Central Office Telephone was part of the first wave of SDN resellers who placed orders for SDN in the fall of 1989. Its president, Gordon J. Rood, had formerly worked for the Bell System and had begun COT's operations by reselling an MCI long-distance service. ER 357-64, 548. But after he heard about SDN, Mr. Rood contacted AT&T about reselling AT&T's service as well. ER 365-66. In October of 1989, Mr. Rood met with an AT&T sales representative -- LaDonna Kisor -- in AT&T's Portland, Oregon office. ER 366-75. She gave Mr. Rood literature on SDN and described the service. ER 366-75, 381-85. She also predicted that AT&T could establish an initial SDN network for COT in four to five months, and that

AT&T could thereafter add new locations within 30 days after receiving an order. ER 389-90, 418, 1819-20.

COT initially subscribed to a tariffed SDN plan under which the up-front installation charges would be waived (*see* p. 7 n.8) and COT would receive a 17 to 20% discount off basic SDN rates in exchange for a four-year commitment to purchase two million minutes of SDN service annually. *See* ER 370. In a letter dated October 25, 1989, AT&T acknowledged COT's order, stating that COT would obtain SDN "pursuant to the rates, terms and conditions in AT&T's [FCC Tariff No. 1]," and that the provisions of this tariff, "including limitations on AT&T's liabilities, shall govern your and AT&T's obligations and liabilities with respect to the service and options you have selected." ER 3721; *see* ER 416, 576. Mr. Rood accepted these terms in writing. ER 3722.

In February of 1990, after the provisioning problems with SDN became apparent, Ms. Kisor told COT that it would take 45 to 90 days to add new locations after the initial SDN network was established. ER 418-21, 1829-30. Ms. Kisor suggested "parking" COT's affected customers on a different AT&T tariffed service (Multi Location Calling Plan) until they could be placed on SDN. *Id.* That service's usage would then be credited toward COT's SDN usage (as it eventually was). ER 420-21, 1830-31. COT ordered this arrangement in March 1990. ER 3737-38; *see* ER 417, 590.

In April 1990, Ms. Kisor informed COT that its initial SDN network was up and running. ER 431-32. COT thereupon elected to increase to a larger SDN volume commitment (15 million minutes annually) in order to qualify for an even larger discount (up to 24%). ER 431-32, 594-95. In placing this order, COT signed a form expressly stating that the SDN service "WILL BE GOVERNED BY THE RATES

AND TERMS AND CONDITIONS IN THE APPROPRIATE AT&T TARIFFS." ER 4037; *see* ER 594, 596-99.

COT began to obtain SDN services in April 1990, but, particularly during the first nine months, COT experienced the provisioning delays and suppressed billing problems that affected all SDN customers. During the first six months that it received SDN service, COT also experienced problems with the multilocation billing format that COT had chosen. ER 468-69, 1893. Although COT had instructed AT&T to prepare bills that included half of COT's volume discount in the data for each location, AT&T personnel initially applied the entire discount. *Id.*[13] AT&T personnel made extensive efforts to offset the error and eventually prepared corrected statements. COT then chose not to attempt to collect the full amounts from its customers for the prior periods. ER 483-84, 2019-20. Although the tariff made it explicit that COT remained fully responsible for the tariffed charges, COT refused to pay nearly $200,000 that AT&T had billed and that COT had been obliged to pay under the SDN tariff for the period in which COT used multilocation billing. ER 2925-26, 491. In October 1990, COT switched to network billing, pursuant to which AT&T sent COT a single monthly statement for all SDN usage, and COT then sent its own individual bills with mark-ups to its customers. ER 1946, 2607, 4593. COT had, in fact, always planned to switch to network billing eventually. ER 2542.

COT used more than 8,500,000 minutes of SDN during the first year to which its usage commitment applied (April 1991 to April 1992), and COT would have exceeded its 15 million minute commitment during this period if it had not

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[13] It was determined that the error occurred because Ms. Kisor checked the wrong box (LABO) when she entered COT's provisioning data into AT&T's computers. ER 1761-62, 2534-35; *see* p. 8 n.9, *supra*.

switched many customers to a competing Sprint service, which COT also resold. ER 3029; *see* ER 4323.

In September 1992, COT notified AT&T that it was terminating its SDN service effective September 30, 1992. There were then 18 months remaining on COT's four-year commitment. ER 4621-22. This decision subjected COT, among other things, to liability for part of the charges for installing COT's initial SDN network which had been waived in exchange for COT's term and volume commitments. ER 4623. COT did not pay these tariffed charges.

By the time COT terminated SDN, AT&T was provisioning new orders within 45 to 60 days; COT had no monthly billing problems with network billing, and the major causes of unbilled toll had been eliminated. ER 2020, 2511, 2820-23. In the interim, however, AT&T's basic SDN rate schedules, from which COT's discounted rates were computed, had been increased by 2% in April of 1991, by another 2% in September of 1991, and by 7% in June of 1992. ER 533. COT stated in its amended complaint that it terminated SDN because of these price increases. J.A. 28; ER 30.

E. This Lawsuit.

COT sued AT&T on November 27, 1991, in the United States District Court for the District of Oregon, and AT&T later filed a counterclaim to recover the $200,000 in unpaid tariffed charges from 1990 and the termination charges that COT did not pay in 1992. ER 55-58.

COT's claims were not brought under Section 206 of the Communications Act, and its complaint did not claim that AT&T had violated its tariff (a violation of Section 203) or any

other provision of the Communications Act.[14] Rather, in addition to other federal and state claims that were dismissed, COT raised state law claims for (1) breach of contract and breach of an implied covenant of good faith and fair dealing and (2) tortious interference with COT's contracts with its customers. J.A. 29-34; *see* ER 2471, 2476-77. As the Ninth Circuit stated, both the contract and the tort claims rested on the same fundamental premises: that the agreement between COT and AT&T was not limited by the terms of AT&T's tariff, but "included all the understandings that COT's president had from reading service brochures and from talking with AT&T representatives" and that AT&T had breached these contractual duties. Petn. 6a; *see* J.A. 70-71.

In particular, COT claimed that statements of AT&T personnel constituted a binding guarantee that AT&T would provide an array of services that were better and more valuable than specified in the tariff. It claimed that AT&T guaranteed to provision SDN and other orders within short time frames, to bill service expeditiously, to allocate charges among COT's customers, and to excuse COT from the tariff's requirements that deposits be posted. J.A. 23-29. Further, although the FCC has repeatedly stated there is no such duty under federal law (*see* pp. 5-6, *supra*), COT also broadly argued that AT&T had impliedly agreed to provide SDN services that were "functional" for COT's purposes, and that the "implied" state law duty "of good faith and fair dealing" prohibited any actions by AT&T that undermined the contract's "purpose" of assuring COT could profitably resell SDN. J.A. 68-71. COT claimed that AT&T had breached this last alleged duty by lawfully

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[14] Following the close of discovery, COT sought leave to amend its complaint to add a claim for unlawful discrimination under Section 202(a), but this motion was denied by the magistrate judge as untimely. J.A. 6-7, ER 158-59. COT did not appeal this ruling to the Ninth Circuit.

raising basic SDN rates and taking other actions that were required or permitted by the Communications Act.[15] Finally, COT claimed that AT&T's breaches of these agreements excused COT from paying the $200,000 in usage charges in 1990 and allowed it to terminate service in 1992 without paying the termination charges covering, among other things, the unamortized portion of the costs of installing COT's initial SDN network. *See* ER 491, 3195-96.

AT&T asserted at each pertinent stage of the district court proceedings that COT's state law contract and tort claims were preempted by the filed tariff requirements of § 203 of the Act. ER 87-100, 2373-89, 2448-57, 4706-17. The magistrate judge rejected AT&T's preemption defense at each stage. The magistrate judge instructed the jury that to "determin[e] the terms and conditions of the parties' agreements, you're to consider the three subscription agreements" of October 1989, March 1990, and April 1990. J.A. 70; ER 3331. In addition, he instructed that the jury could "also consider any oral statements or written documents which were made or furnished before the parties signed the various agreements if you find that the parties intended that those statements or written materials form part of their agreements" and that it could consider whether AT&T violated its implied duty of good faith by taking any steps that frustrated the contract's purpose. J.A. 70, 71; ER 3332-33. He also instructed the jury that it had to find that AT&T's breaches of these agreements were "willful." J.A. 70; ER 3331.

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[15] Ironically, COT stated that the "most significant" instance of misconduct in violation of the implied agreement was AT&T's centralization of SDN provisioning, which assured that COT received the same level of support as other resellers, and which ultimately solved the provisioning problems, but which allegedly meant COT received less support than Ms. Kisor had provided. *See* ER 3190.

The jury found for COT on its state law claims, rejected AT&T's counterclaim for unpaid tariff charges, and awarded $13,000,000 of "lost profits." App. 48a; J.A. 69; ER 4681-82. The magistrate judge subsequently reduced the judgment for COT to $1.154 million, which represented the lost profits COT had claimed during the period before it canceled SDN on September 30, 1992. Petn. 47a; ER 4781-82, 4790.[16]

Over Judge Brunetti's dissent, the Ninth Circuit affirmed this judgment and remanded for a trial on whether COT's success on its tortious interference claim also entitled it to punitive damages under Oregon state law. Petn. 1a-30a. On July 18, 1997, the Court of Appeals denied AT&T's petition for re-hearing and suggestion for re-hearing en banc. Petn. 49a.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. COT's $1.154 million judgment epitomizes the preferences and discrimination among similarly situated customers that the Communications Act prohibits. In particular, this judgment did not rest on claims that AT&T had violated its tariff or that any provision of its tariff violated Section 201(b)'s or Section 202(a)'s prohibitions against unreasonable rates, practices, or discrimination. Nor did COT claim that AT&T had engaged in unreasonable practices or discrimination against COT or other resellers and in favor of corporate customers in its actual provision of service. Notably, while other SDN resellers have litigated those claims, they

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[16] COT appealed the district court's reduction of the judgment, but the Ninth Circuit affirmed this decision (Petn. 14a-18a), and this Court denied COT's petition for certiorari presenting this issue.

have, to date, been rejected by the juries and courts who have decided them.[17]

COT's judgment was entered solely under state contract and tort law. COT was permitted to argue, and the jury was permitted to find, that COT had been impliedly promised faster, costlier, and more valuable services than was required by AT&T's tariff or by the Communications Act. COT was thus awarded damages (and excused from paying tariffed charges for the services it received) because COT did not receive better service than the hundreds of resellers and other customers who subscribed to the same AT&T SDN service during the period from 1990 to 1992. For example, COT claimed that AT&T's representative impliedly made untariffed guarantees that COT's orders would be provisioned within 30-90 days, that no bills for any services would be delayed, that AT&T would allocate charges and usage among COT customers, and that SDN would be "functional" for COT and would enable it "profitably" to resell SDN.

However, the decisions of this Court establish that no such promises could have lawfully been made and that COT's judgment constitutes an illegal "rebate" and "preference." *See, e.g., Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439-41 (1907); *Keogh* v. *Chicago & N. W. Ry.*, 240 U.S. 156, 163 (1922). For the same reason, the Ninth Circuit's decision affirming this judgment is contrary to the terms of the Act and is foreclosed by a century of decisions of this Court.

2. The fundamental error of the Ninth Circuit panel majority is its holding that the statutory filed tariff requirements apply only to "rates" and "ratesetting." Section 203(a) of the

[17] *US WATS, Inc.* v. *AT&T*, No. 93-CV-1038 (E.D. Pa. Dec. 15, 1995); *Teledesign* v. *AT&T*, No. H-92-1919 (S.D. Tex. Apr. 21, 1994).

Communications Act requires all carriers to file tariffs that include not only all their rates, but also "the classifications, practices, and regulations affecting such charges." Section 203(c) further expressly prohibits carriers from extending to customers any "privileges" or employing any "classifications, regulations, or practices affecting . . . charges" that are not "specified" in the filed tariff.

Moreover, this Court has squarely held that the filed tariff doctrine prohibits untariffed guarantees of better and "expedited service" such as COT alleged. In particular, one of COT's principal claims in this case was that it had been promised the faster provisioning of services than the tariff required: that is, the installation of orders within 30-90 days. But this Court has expressly held, on at least three occasions, that untariffed guarantees to provide faster or "expedited" service (*e.g.*, placing shipments on the "next train") affect the value and cost of service and constitute the "preferences" and "privileges" and "practices affecting . . . charges" that the tariffing requirements prohibit. *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912); *Atchison, T. & S.F. Ry.* v. *Robinson*, 233 U.S. 173 (1914); *Davis* v. *Cornwell*, 264 U.S. 560 (1924). Further, there were myriad other respects in which COT was permitted to claim, and the jury to find, that COT was entitled to services and commitments that were better, costlier, and more valuable than those specified in AT&T's tariff and received by other similarly-situated customers.

3. There is also no merit to the Ninth Circuit's conclusion that two elements of the purported extra-tariff "side agreement" -- provisioning and multilocation billing -- were not "covered" in the tariff and thus could be enforced even if the tariff requirements were not limited to rates. This "alternative" holding would not support COT's judgment even if it were valid. However, it is erroneous for two separate reasons.

First, contrary to the Ninth Circuit's holding, the provisions of AT&T's tariff expressly address both provisioning and billing. The tariff itself forecloses any claim that AT&T had agreed to fill orders within any particular number of days or to engage in the allocations of charges and usage among a reseller's customers that COT here sought.

Second, even if AT&T's tariff had been silent on these subjects, the law is clear that "gaps" cannot be filled by allowing juries to find that individual customers have been guaranteed expedited and enhanced services under state contract or tort law. Indeed, the tariff was silent on these subjects in both *Kirby* and *Davis*, and the Court held that the carriers' only obligations were to provide service on the terms and conditions that could be "implied in the tariff" as a matter of federal law under principles of tariff interpretation: that is, to use due diligence. *Davis*, 264 U.S. at 561; *accord Kirby*, 225 U.S. at 164-65. The Court held in each case that to allow guarantees of expedited and enhanced service to be imposed under state law would constitute the very privileges affecting rates, preferences, and discrimination that tariff filing requirements are designed to prevent.

ARGUMENT

I. THE JUDGMENT IN THIS CASE AWARDS COT A PRIVILEGE AND A PREFERENCE AND THUS VIOLATES THE STATUTORY FILED TARIFF REQUIREMENTS.

Section 203 of the Communications Act is one of a number of statutory filed tariff requirements that was "copied"

from the provisions of the original Interstate Commerce Act.[18] Section 203(a) requires every common carrier to file tariffs containing all their rates, and all "classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). Sections 203(c)(1) and (2) prohibit a carrier from collecting any "less or different compensation" than "specified" in the tariff, and from "refund[ing]" "any portion of the charges so specified" through any "device." 47 U.S.C. § 203(c)(1) & (2). Section 203(c)(3) forbids any carrier from "extend[ing] to any person any privileges . . . in such communication," or employing "any classifications, regulations, or practices affecting such charges," that are not "specified" in the tariff. 47 U.S.C. § 203(c)(3).

As this Court has recognized, "[t]he tariff-filing requirement is . . . the heart" of the regulatory regime established by the Communications Act, and it is to be construed in the same way as the provisions of the Interstate Commerce Act upon which Section 203 of the Communications Act is based. *MCI Telecom. Corp.* v. *American Tel. & Tel. Co.*, 512 U.S. 218, 229-31 (1994). Indeed, the Court has stated that the statutory tariff filing provisions, and the judicial decisions construing them, establish a "filed rate" or "filed tariff" doctrine that "has been extended across the spectrum of regulated utilities." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981).

The "paramount purpose" of the filed tariff requirement is to assure that all similarly-situated customers pay the same tariffed rates, and receive the tariffed services under the same terms and conditions that affect those rates. *Keogh*, 260 U.S. at 163; *see Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497

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[18] *See* S. Rep. No. 781, 73d Cong., 2d Sess. 2, 4 (1934) & H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4, 5 (1934).

U.S. 116, 126-31 (1990); *MCI Telecom. Corp.*, 512 U.S. at 230; *Abilene Cotton Oil*, 204 U.S. at 439-40. The doctrine thereby enforces the separate statutory prohibitions against discrimination and rates and practices that are unjust or unreasonable.[19] *Compare* 47 U.S.C. §§ 201(b) & 202(a) *with MCI Telecom. Corp.*, 512 U.S. at 230 ("rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges").[20] As the Court has held, the filed tariff doctrine prohibits any form of rate discount or preference not provided by the tariff. *Maislin*, 497 U.S. at 127; *MCI Telecom. Corp.*, 512 U.S. at 230.

The Court has made it clear that the strict requirements of the filed tariff doctrine apply even when a customer might reasonably believe that it would receive certain promised benefits not reflected in the tariff, and in these cases the doctrine may appear "harsh." *Maislin*, 497 U.S. at 128. In this case, however, there is nothing harsh about a holding that COT's rights and duties are defined by the applicable AT&T tariff, and could not be altered by the representations that AT&T's employees are claimed to have made orally or impliedly. In particular, *after* these representations had purportedly been made, AT&T made it as clear as language can make it that COT's rights and duties would be governed by

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[19] The doctrine also preserves the authority of the regulatory agency to maintain a uniform national policy, by assuring that all questions involving rates and associated services can be brought before the responsible agency for its review and oversight. *See Robinson* v. *Baltimore & O. R.R.*, 222 U.S. 506, 509 (1912); *Abilene Cotton Oil*, 204 U.S. at 440-41.

[20] Indeed, Congress has prospectively authorized exceptions to the tariff filing requirements after February 8, 1996, only where the *FCC* determines, among other things, that the tariff filings are not required to enforce these requirements for particular carriers. Telecommunications Act of 1996, Pub. L. 104-104, § 401, 110 Stat. 128 (1996) (codified at 47 U.S.C. § 160).

AT&T's tariff, and COT's President (who had previously worked for the Bell System) then agreed to these terms in writing on *three* different occasions. *See* pp. 14-15, *supra*. In this regard, the filed tariff doctrine operates as a strict rule against use of "parol" evidence and alleged side agreements, thus preventing easily manufactured claims against common carriers, which are *obliged* to provide service in accordance with their tariffs and whose sales agents have no freedom of contract (and no conceivable reason to make legally binding guarantees of an expedited service for which there can be no extra charge). *See Robinson*, 233 U.S. at 180-81.

Finally, this Court has long held that the statutorily-forbidden preferences or privileges include not only those extended voluntarily by carriers, but also court-awarded damages for the carrier's violation of express or implied promises to confer such an advantage. "[T]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Keogh*, 260 U.S. at 163 (quoted in *Maislin*, 497 U.S. at 126). Otherwise, customers who are awarded damages under state law "would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced." *Abilene Cotton Oil*, 204 U.S. at 441 (preempting state tort actions for charging unreasonable rates); *see also Boston & M. R.R.* v. *Hooker*, 233 U.S. 97, 109-10 (1914) (preempting state law contract claims); *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 505-06 (1913) (same). Indeed, the Court has held that the filed tariff requirements even preclude certain damages awards under federal antitrust laws, for "[i]f a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors." *Keogh*, 260 U.S. at 163.

Under these settled principles, COT's judgment violates Section 203(c) of the Act. It awards COT damages (and excuses its failure to pay tariffed charges) on the ground that AT&T breached untariffed "side deals" that purportedly guaranteed COT services that were faster, better, and immensely more valuable than required by AT&T's tariff. COT claimed it was not only guaranteed expedited service that others did not receive, but it was promised that SDN would be "functional" for COT and that it would enable COT to profit from resale -- guarantees that no resale or other customer receives under the tariff. *See* J.A. 68, 69; pp. 17-18, *supra*.

II. THE FILED TARIFF REQUIREMENT IS NOT LIMITED TO RATES, BUT APPLIES TO ALL TERMS AND CONDITIONS THAT AFFECT RATES.

The Ninth Circuit did not deny any of the foregoing principles. However, it held that the filed tariff requirements and this Court's holdings do not apply in this case because they concern only "rates or rate-setting" and not "provisioning of services and billing" or other matters that affect the value or cost of service. Petn. 10a. The Ninth Circuit cited no decision of this Court in support of this ruling, relying instead on statements from the lower courts about some of the purposes of filed tariff requirements. *Id.* In fact, the Ninth Circuit's ruling is contrary to the plain language of the statute, longstanding precedent of this Court, the uniform decisions of other courts of appeals, and common sense.

First, by the very terms of the Communications Act, the tariff-filing requirement applies not only to rates, but also to "the classifications, practices, and regulations affecting" rates. 47 U.S.C. § 203(a). The Act further expressly prohibits carriers from extending to any customer any "privileges" or employing

any "classifications, regulations, or practices affecting" charges that are not "specified" in the tariff. 47 U.S.C. § 203(c)(3). In this case, COT claimed that AT&T acted unlawfully both in applying the rate-affecting provisions of its tariff to COT (*e.g.*, deposit requirements) and, more fundamentally, in failing to extend COT a host of "privileges" and "classifications, regulations, or practices affecting" rates that were not contained in AT&T's tariff.

The plain language of Section 203 prohibited this conduct every bit as much as it prohibited AT&T from deviating from the tariffed rates. 47 U.S.C. § 203(c). This Court has long held this prohibition is not limited to "rates," but "applies equally to . . . any of the *services* within the purview of the Act." *Southern Ry.* v. *Prescott*, 240 U.S. 632, 638 (1916) (emphasis added); *accord Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966 (1986) ("the filed rate doctrine is not limited to 'rates' *per se*").

Indeed, this Court has held that these requirements preclude the very claims for expedited provisioning and billing that COT here asserted under state contract and tort law. For example, in *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912), a railroad agent had told a shipper that his racehorses would be sent from Springfield, Illinois, to New York City on a particular express train. When the railroad instead shipped the horses by "a later and much slower train" (*id.* at 163), the shipper sued for breach of contract. A jury awarded damages, and the state supreme court affirmed. This Court reversed, holding that even if the rate the carrier should charge were not altered, such a contract for expedited service could not be enforced because it would be "an undue advantage in that it is not one open to all others in the same situation." *Id.* at 165.

This Court reasoned that the carrier's tariffs "did not provide for an expedited service, nor for transportation by any particular train." *Id.* at 163. The "guarantee" to expedite the shipment, by contrast, caused the carrier to come "under a liability different and more burdensome than would exist to a shipper who made no such special contract," and the agreement affects rates in that it "affects the value of the service to the shipper and its costs to the carrier." *Id.* at 165. Such a "guarantee," the Court explained, was illegal because it was not "published in the tariffs" and because it provided for an "advantage" and "preference" not open to all others in the same situation. *Id.*

Similarly, in *Davis* v. *Cornwell*, 264 U.S. 560 (1924), the Court (per Justice Brandeis) reversed a judgment that enforced another agreement to provide expedited service (there, the delivery of railroad cars on a specified day) on the ground that such guarantees are valuable and the tariff did not address the subject. The Court explained that "[t]he assumption by the carrier" of any such additional untariffed obligations "was necessarily a preference." *Id.* at 562; *accord Robinson*, 233 U.S. 173. Such a "preference" would permit the customer to sue and recover lost profits for a breach, when similarly situated customers could not get that same recovery.

Kirby, *Davis*, and their progeny have been uniformly followed by each of the courts of appeals to address those same issues. Indeed, the Seventh Circuit stated more than 50 years ago that, "[i]n our judgment, this question has been so definitely settled by the Supreme Court that further decisions by us would be superfluous." *Consumers' Mut. Oil* v. *Schaff*, 59 F.2d 730, 731 (7th Cir. 1932); *accord Competitive Telecom. Ass'n* v. *FCC*, 998 F.2d 1058, 1062 (D.C. Cir. 1993); *Paulson* v. *Greyhound Lines, Inc.*, 804 F.2d 506, 507-08 & n.5 (8th Cir. 1986); *Transcontinental Bus. Sys., Inc.* v. *CAB*, 383 F.2d 466, 481-82 (5th Cir. 1967).

The Ninth Circuit's distinction between rates and other terms and conditions of services not only is foreclosed by the Act and the prior decisions of this Court and other courts of appeals, but also defies common sense. If one customer is guaranteed expedited and more valuable service than other customers, it effectively pays a lower rate than those other customers, for it receives better service for the same price. An interpretation limiting the filed tariff doctrine to rates would therefore allow ready evasion of the central mechanism for enforcing the policies of the Act. *See* Petn. 21a (Brunetti, J., dissenting).

Finally, the Ninth Circuit majority's attempt to distinguish *Kirby*, *Davis*, and *Robinson* is unavailing. It states, correctly, that "the agreements cited in these cases were for special expedited shipping services for which the customer would have been expected to pay a higher rate." Petn. 10a n.9. But that is true here as well. AT&T would not, and could not, have guaranteed such expedited service to any customer unless it received a higher rate, for AT&T would be providing more valuable and costlier service, and would come under a more burdensome liability.

In this regard, it is irrelevant that "COT [now] *contends* that AT&T provided special services to others, but denied them to COT." Petn. 10a n.9 (emphasis added). There is no record evidence of such differential treatment, much less of a guarantee to corporate customers. Further, even if there were such evidence, this "content[ion]" would have no relevance to the question of what services AT&T guaranteed it would provide COT under the tariff. Instead, it could only have been evidence that AT&T had discriminated against COT and other

resellers by provisioning only the orders of corporate customers more rapidly than the tariff had guaranteed. But COT made no Section 202 claim in its complaint; it was denied leave to amend its complaint on the eve of trial to add such a claim, and COT did not appeal that ruling. *See* p. 17 n.14, *supra*; J.A. 19-36, 37, ER 158-59. Further, when these claims have been litigated by other SDN resellers from this period, they have been rejected by the courts and juries that decided them. *See* p. 20 n.17, *supra*. There is thus no basis to uphold COT's judgment by relying on belated and unproven "contentions" of discrimination.

This is particularly so because COT not only claimed a right to the expedited service that COT "contended" had been received by corporate SDN customers. It also claimed a nontariffed entitlement to other service terms and conditions that are immensely more valuable than those received by corporate customers and the SDN resellers with whom COT competed: that is, services that are "functional" for COT and would assure that COT could profitably resell SDN. *See* p. 18, *supra*. These are guarantees no customer receives, and providing them only to COT would have constituted unlawful discrimination against SDN resellers and other customers.

Finally, although the filed tariff doctrine clearly bars claims for privileges that affect rates as well as claims for preferential rates, this does not mean that COT did not have available to it a full and adequate damages remedy for its service-related complaints. First, of course, if a customer believes a carrier has failed to provide service in accord with the tariff, the customer may sue for damages for violation of Section 203. *See, e.g.*, *Wallace* v. *AT&T Communications of the Southern States, Inc.*, 6 F.C.C.R. 1618, 1618 (1991). Second, even if the carrier is in compliance with the tariff, the customer may seek damages by claiming that particular tariff

provisions represent unjust or unreasonable practices or discrimination. *See, e.g.*, *AT&T Corp.* v. *FCC*, 86 F.3d 242, 243 (D.C. Cir. 1996). Finally, if a customer believes that the carrier is applying tariff provisions in an unequal fashion among similarly-situated customers, it may challenge this conduct as unjust and unreasonable discrimination or an unreasonable practice. *See, e.g.*, *People's Network, Inc.* v. *American Tel. & Tel. Co.*, 1997 FCC LEXIS 1928, *1 (Common Carrier Bureau, Apr. 10, 1997). Thus, while the filed tariff doctrine is "undeniably strict" in the domain where it operates, *Louisville & N. R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915), there are federal remedies for any deficient or discriminatory service that avoids the preferences under state law that COT here obtained.

III. ALTHOUGH AT&T'S TARIFF "COVERED" BOTH BILLING AND PROVISIONING, COT'S CLAIMS WOULD BE FORECLOSED BY § 203 AND THIS COURT'S DECISIONS EVEN IF THE TARIFF HAD BEEN SILENT ON THESE SUBJECTS.

The Ninth Circuit also stated that the "filed-rate doctrine could not apply to any of COT's claims with regard to [multilocation] billing or provisioning" even if the doctrine were not limited to rates and "could apply to other aspects of the SDN service." Petn. 11a. It concluded that these two aspects of COT's claimed agreement are not "covered by the tariff" and are thus outside the statutory filed tariff requirements. *Id.* In Judge Brunetti's words, the majority found that there were gaps in AT&T's tariff and "that [state] common-law applies to fill in gaps left in tariffs." Petn. 26a.

Even if this "alternative" holding could support the jury's verdict,[21] it is erroneous for two separate reasons.

First, the Ninth Circuit was simply wrong in holding that provisioning and billing are not "covered by the tariff." There are no such "gaps" in AT&T's SDN tariff. The tariff addresses both the provisioning and billing of SDN orders, and its provisions foreclose COT's specific claims.

With respect to provisioning, the tariff does not require that orders be provisioned in any particular number of days. Rather, the tariff states that after each individual order is placed, AT&T is to "establish and confirm a due date" in light of conditions that then exist, and make "reasonable efforts" to meet *that* date. *See* p. 7, *supra*. The tariff goes on to warn customers that even this "due date" may be missed and provides the customers the remedy of canceling service without incurring liability if the due date is missed by more than 45 days. *See id.* COT's claim that it had been guaranteed that its orders would be provisioned within 30-90 days -- regardless of the circumstances -- squarely conflicts with those provisions.

Similarly, the tariff forecloses COT's claim that AT&T breached agreements with it during the six month period in which COT elected the "multilocation billing" format. Although the tariff does not describe multilocation billing or any other *formats* for the bills, the tariff's billing provisions state that AT&T "will not" engage in the "allocat[ion]" of "usage" or "charges" among end user locations on an SDN network. *See* pp. 7-9, *supra*. Rather, the tariff provides that the

[21] Even if the filed tariff doctrine did not apply to provisioning and billing, the jury was erroneously allowed to consider a wide range of other claims that the Ninth Circuit assumed *were* covered by the doctrine. Allowing the jury to consider these other claims fatally infected the verdict.

customer (COT) is responsible for paying for all usage on its network when bills for service are issued and for allocating charges and usage among its end user locations. *Id.*[22]

Second, the Ninth Circuit's alternative holding would be erroneous even if AT&T's SDN tariff had been silent on the question of AT&T's responsibility to provision orders or to provide the specific multilocation billing services that COT claims. Both the terms of the Act and this Court's holdings establish that any such "gaps" in the tariff must be "filled in" uniformly as a matter of federal law, not by juries or courts enforcing alleged extra-tariff promises under state common law.

The *only* commercial relationship between AT&T and COT is that COT subscribed to AT&T's SDN service in exchange for COT's payment of the tariffed rate.[23] Thus, the

[22] Contrary to the Ninth Circuit, no "AT&T tariff expert" testified otherwise at trial on either provisioning or billing. Rather, in deposition testimony in another case, an AT&T employee stated that *details* of the rendering of bills and the provisioning of services are not specified in AT&T's tariff (ER 1774) -- as they are not. By contrast, the terms of the tariff foreclose the provisioning and billing guarantees that COT claims. In all events, it was error to submit the question of the meaning of AT&T's tariff to a jury for determination under state law, for questions of tariff interpretation are questions of law to be resolved under federal standards.

[23] As the Seventh Circuit recently held, matters might be otherwise only if there were two separate "promises" that were "severable," *e.g.*, if COT had both subscribed to SDN service in exchange for payment of the tariffed rate and AT&T had separately promised to "sell the plaintiff a bushel of Ugli fruit at market price." *Cahnmann* v. *Sprint Corp.*, 1998 U.S. App. LEXIS 118, *12 (7th Cir. Jan. 7, 1998). The Seventh Circuit held that there were no such separate promises in *Cahnmann*, and noted that the "probably" there was not in this case either, for the reasons stated in Judge Brunetti's dissent. *Id.*

question of what services COT is entitled to receive for payment of the tariffed rate is a question of tariff interpretations that is decided as a matter of federal law. *See Great N. Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922); *Southern Ry.* v. *Prescott*, 240 U.S. 632, 636, 639-40 (1916). There is thus no "room" for state contract law. *See Cahnmann* v. *Sprint*, 1998 U.S. App. LEXIS 118 (7th Cir. Jan. 7, 1998) (Posner, J.).

By contrast, if "gaps" in a tariff could be filled by allowing state law claims like COT's, it would produce the very rebates, preferences, and privileges affecting rates that Section 203(c)'s terms prohibit. That was the Court's precise holding in *Kirby*, 225 U.S. 155, and *Davis*, 264 U.S. 560.

Indeed, it was the case in both *Kirby* and *Davis* -- as the Ninth Circuit majority believed it to be the case here -- that the tariff was silent on the carrier's duties in provisioning service. Notwithstanding that circumstance, both decisions hold that the only provisioning obligation to which the carrier can be treated as having agreed is that which could be "implied in the tariff" as a matter of federal law under principles of tariff interpretation: that is, to "use diligence" and to act reasonably. *Davis*, 264 U.S. at 561; *accord Kirby*, 225 U.S. at 164-65. Indeed, this Court not only has held that tariff obligations are to be interpreted under federal law,[24] but also has required that courts refer questions of tariff interpretation to the responsible agency under the primary jurisdiction doctrine to assure that those questions are resolved uniformly and in accord with the Act's substantive requirements.[25]

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[24] *Great Northern Ry.*, 259 U.S. at 290; *Southern Ry.*, 240 U.S. at 636, 639-40.

[25] *See United States* v. *Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956).

This is not to say that tariffs must prescribe all details of the provision of tariffed service. There are many features of service and many choices to be made in implementing service requests under a tariff that do not affect charges, that do not have to be specified in tariffs, and that are worked out by carriers and their customers, subject only to the statutory prohibitions against unreasonable practices and discrimination and against deviations from that carrier's tariff. But it is a federal question whether an untariffed promise constitutes a privilege or practice that affects rates, and *Kirby* and *Davis* squarely hold that untariffed guarantees of the kinds of expedited and enhanced services that COT sought here cannot be imposed under state law, whether or not AT&T's tariff had specifically addressed these matters. Moreover, because AT&T's tariff covered these subjects and is inconsistent with COT's claims (*see* pp. 33-34, *supra*), COT's judgment in this case is patently improper.[26]

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[26] In its opposition to the petition for certiorari, COT sought to defend its judgment on the ground that AT&T's tariff does not limit its liability for "willful misconduct" and the jury found that AT&T's breaches of the untariffed side agreements were "willful." COT is confused. The tariff provision addresses the *amount* of AT&T's liability when it violates its tariff. *See* p. 9, *supra*. By contrast, it is not "willful misconduct" for AT&T to refuse to extend untariffed preferences to COT and thereby violate Section 203. That is what the law requires.

CONCLUSION

For the foregoing reasons, AT&T Corp. respectfully requests that the judgment of the Ninth Circuit be reversed.

Respectfully submitted,

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APPENDIX TO PETITIONER'S BRIEF

Sections 201-208 of the Communications Act of 1934,
47 U.S.C. §201-208 ..... 1a

Provisions of AT&T FCC Tariff No. 1 ..... 10a

TITLE II-COMMON CARRIERS

Part I - COMMON CARRIER REGULATION

SEC. 201. [47 U.S.C. 201] SERVICE AND CHARGES.

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: *Provided*, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions

of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commissioner may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

SEC. 202. [47 U.S.C. 202] DISCRIMINATION AND PREFERENCES.

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communications, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

SEC. 203. [47 U.S.C. 203] SCHEDULES OF CHARGES.

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire

or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) (1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in

connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

SEC. 204. [47 U.S.C. 204] HEARING AS TO LAWFULNESS OF NEW CHARGES; SUSPENSION.

(a) (1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge,

classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified. At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2) (A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective.

(B) The Commission shall, with respect to any such hearing initiated prior to the date of enactment of this paragraph, issue an order concluding the hearing not later than 12 months after such date of enactment.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a).

(3) A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period, as is appropriate.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection(a).

SEC. 205. [47 U.S.C. 205] COMMISSION AUTHORIZED TO PRESCRIBE JUST AND REASONABLE CHARGES.

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be

thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $12,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

SEC. 206. [47 U.S.C. 206] LIABILITY OF CARRIERS FOR DAMAGES.

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequences of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

SEC. 207. [47 U.S.C. 207] RECOVERY OF DAMAGES.

Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

SEC. 208. [47 U.S.C. 208] COMPLAINTS TO THE COMMISSION.

(a) Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b) (1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation,

or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to the date of enactment of this subsection, issue an order concluding the investigation not later than 12 months after such date of enactment.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a).

2.3. RESPONSIBILITIES OF THE COMPANY

2.3.1. Liability

A. The Company's liability, if any, for its willful misconduct is not limited by this tariff. With respect to any other claim or suit, by a Customer or by any others, for damages associated with the installation, provision, termination, maintenance, repair or restoration of LDMTS, and subject to the provisions of B. through G. following, the Company's liability, if any, shall not exceed an amount equal to the initial period charge provided for under this tariff for the LDMTS call for the period during which the call was affected or, for a DIAL-IT 900 Service Sponsor, shall not exceed an amount equal to the charge a Sponsor would pay pursuant to Section 5.1.3.B.4. following, if the Sponsor received no calls during the program day for which the DIAL-IT 900 Service was affected. This liability for damages shall be in addition to any amounts that may otherwise be due the Customer under this tariff as a credit allowance (see Credit Allowances for Interruptions, page 29).

B. The Company is not liable for damages associated with service, channels, or equipment which it does not furnish.

C. The Company is not liable for damages to a premises resulting from the furnishing of LDMTS, including the installation and removal of equipment and associated wiring, unless the damage is caused by the Company's negligence.

D. The Company shall be indemnified, defended, and held harmless by the Customer and User against all claims, losses,

or damages arising from the use of LDMTS furnished pursuant to this tariff, involving:

1. Claims for libel, slander, invasion of privacy, or infringement of copyright arising from any communication;

2. Claims for patent infringement arising from combining or using LDMTS furnished by the Company in connection with facilities or equipment furnished by others; or

3. All other claims arising out of any act or omission of others relating to LDMTS provided pursuant to this tariff.

E. The Company does not guarantee or make any warranty with respect to LDMTS when used in an explosive atmosphere. The Company shall be indemnified, defended, and held harmless by the Customer and User against all claims, losses or damages by any person relating to LDMTS provided pursuant to this tariff when used in an explosive atmosphere.

2.4. RESPONSIBILITIES OF THE CUSTOMER

2.4.1. General - The Customer's general responsibilities are described in this section. When Customer equipment or a Customer-provided communications system is connected to LDMTS, the Customer assumes additional responsibilities that are described in the Connections section of this tariff (see Connections, page 30).

A. Placement of Orders, Payment of Bills and Compliance with Regulations - The Customer is responsible for placing any necessary orders and complying with tariff regulations for LDMTS and for assuring that its Users comply with tariff regulations. The Customer is also responsible for the payment

of bills for LDMTS. This includes payment for LDMTS calls or services:

- Originated at the Customer's number(s),
- Accepted at the Customer's number(s) (e.g., Collect Calls),
- Billed to the Customer's number via Third Number Billing if the Customer is found to be responsible for such call or service, the use of a Calling Card, or the use of a Company-assigned Special Billing Number, and
- Incurred at the specific request of the Customer.

The Customer may appoint an agent to act on its behalf, as specified in B. following.

1. Information the Customer Must Provide - When a Customer places an order for LDMTS, the following information must be provided:

   - The Customer contact name, telephone number, and address at each premises where installation will be made, and

   - The Customer's billing name and address.

B. Agency Agreement - The Company will accept orders from an agent appointed by the Customer. An agency appointment must be sent to the Company in writing. If directed by the Customer, the bill for LDMTS will be sent to the agent. The bill will be issued in the name of the Customer, in care of the agent.

The Customer retains responsibility for compliance with tariff regulations and any act or omission of the agent, regardless of

any limitations the Customer may place on the agent's authority.

C. Establishing Identity

1. The calling party is responsible for establishing its identity as often as necessary during the course of a call.

2. The calling party assumes full responsibility for identifying the station, party, or person with whom connection is made at the called number or numbers.

2.5. PAYMENTS AND CHARGES

2.5.1. General - The charges for an LDMTS call except for optional calling plans are applied on a per call basis. Other LDMTS offerings are charged on a monthly basis. Applicable recurring and/or non-recurring charges are contained in Sections 3 through 6 of this tariff.

2.5.2. Application of Charges - The rates and charges that are in effect in this tariff when LDMTS is furnished are the rates and charges used to determine the Customer's bill. If the rates for services furnished on a monthly basis change after a bill has been rendered, the bill will be adjusted to reflect the new charges (see Fractional Charges and Credits following on page 28.1).

2.5.3. Payment of Charges - Payment for LDMTS is due upon presentation of the bill. LDMTS may be denied for nonpayment of a bill (see Violation of Regulations, page 43). In addition, the following payment provisions are also applicable to LDMTS:

A. When the Company provides the billing function for LDMTS Customers in Minnesota who obtain their local exchange service from Northwestern Bell Telephone Company, starting September, 1985 and ending not later than August 31, 1989, the following applies:

1. For business Customers, payment of charges is due upon presentation of the bill.

2. For residence Customers, payment of charges will be made in accordance with one of the following options:

(a) The payment of all charges is due upon presentation of the bill, or

(b) Customers who have selected a minimum payment option prior to May 1, 1988 may elect to pay all charges in full, or make a minimum payment, upon presentation of the bill. The minimum payment will be $20.00 or 25 percent of the unpaid charges, whichever in greater. The Customer may continue to select the minimum payment option for charges billed through the and of July 31, 1988. However, all new charges billed after July 31, 1988 are due upon presentation of the bill. All outstanding balances must be paid in full prior to the end of August 31, 1989.

When a residence Customer has not paid the entire bill and uses the minimum payment provision, the unpaid portion of the monthly bill is subject to a monthly finance charge of 1.5 percent on the average daily balance.

B. When a local exchange company provides the billing function on behalf of the Company, the local exchange company's local exchange service payment of charges regulation applies.

2.5. PAYMENTS AND CHARGES (Continued)

2.5.4. Late Payment Charge - When a local exchange company provides the billing function on behalf of the Company, the local exchange company's local exchange service late payment charge applies.

2.5.5. Advance Payment - An advance payment will be required before service is provided only when a Customer has a history of late payments to the Company or when a Customer's financial responsibility is not a matter of record. The advance payment will be the non-recurring charge(s), if any; one month's recurring service charge; and one month's estimated usage charges for LDMTS other than DIAL-IT 900 service. The advance payment for DIAL-IT 900 service will not exceed the non-recurring charge(s) and the charge associated with the minimum daily call minute or call volume requirement for 30 days. The advance payment will be credited on the Customer's initial bill. A deposit may apply in addition to an advance payment (see Deposits, following).

2.5.6. Deposits - The following deposit provisions are applicable to LDMTS:

A. When the Company provides the billing function for LDMTS, the Company will require only a Customer who has a proven history of late payments to the Company or whose financial responsibility is not a matter of record to make a deposit to be held as a guarantee for the payment of charges. A deposit does not relieve the Customer of the responsibility for the prompt payment of bills on presentation. In lieu of a cash deposit, the Company will accept, as a deposit, Bank Letters of Credit and Surety Bonds. An advance payment may be required in addition to a deposit (see Advance Payment, Section 2.5.5. preceding).

1. Deposit Amount

(a) The deposit for LDMTS other than DIAL-IT 900 service will not exceed an amount equal to twice the estimated average monthly usage charges and/or the monthly recurring charges.

(b) The deposit for DIAL-IT 900 service will not exceed an amount equal to twice the charge associated with the minimum daily call volume or call minute requirement for 30 days.

2. Interest on a Cash Deposit - Interest will be paid to a Customer for the period that a cash deposit is held by the Company. The interest rate used will be simple interest at the rate of six percent annually unless a different rate has been established by the appropriate legal authority in the state where the LDMTS offering is located.

3. Return of a Deposit - Any deposit collected will be credited to a Customer's account, when the Customer has established credit, or when the Customer has established a prompt payment record with the Company for one year. When the service for which the deposit has been required is discontinued, the deposit is applied to the final bill and any credit balance is refunded to the Customer with applicable interest accrued.

B. When a local exchange company provides the billing function on behalf of the Company, the local exchange company's local exchange service deposit regulation will apply.

Interest on the cash deposit and return of the deposit will also be as specified in the local exchange company's local exchange service deposit regulation.

2.5.7. Return Check Fee - When the Company provides the billing function for LDMTS Customers in Minnesota who obtain their local exchange service from Northwestern Bell Telephone Company, an administrative charge is applied to a residence or business Customer bill for each occasion that a check, bank draft, or an electronic funds transfer item is returned for the reason of insufficient funds or no account.

	Administrative Charge
- Per occasion (Return Check Fee)	$14.45

2.5.8. Minimum Payment Period and Notice of Discontinuance

A. Minimum Payment Period - The minimum payment period is the minimum period, if any, for which the Customer is required to make payment for the LDMTS offering. The charges applicable for this period include the minimum recurring charge(s) plus any nonrecurring and/or special construction charge(s) that may be due.

The minimum payment period is calculated from the date that billing starts after (1) the initial installation, or (2) a reinstallation after a change.

Minimum payment period charges apply if the Customer discontinues an LDMTS component before the specified minimum payment period expires. The minimum payment period for a given LDMTS component is specified in the section of this tariff applicable to that LDMTS component.

B. Notice of Discontinuance - AT&T requires notice when LDMTS is to be discontinued. The required notice period and the application of discontinuance charges, if any, are specified for each LDMTS Offering in this tariff.

2.5.9. Types of Charges - There are two types of charges associated with LDMTS, recurring and nonrecurring.

A. Recurring Charges - Recurring charges are incurred on a monthly or per unit of use basis, as specified for each LDMTS offering.

1. Monthly Charge - A flat charge applies for each month in which service is furnished and is prorated for a fractional month of service. Monthly charges start on the day after the service is installed, but not before the due date of the order unless the Customer agrees to an earlier installation. Charges accrue through and include the day that service is discontinued. Monthly charges are billed in advance, except where prohibited by law. When the billing date and the date that the service is started, changed, or discontinued do not coincide, the charges will be adjusted to reflect the fractional part of the month involved (see Fractional Charges and Credits, page 28.1). For billing purposes, each month is considered to have 30 days.

2. Usage Charge - Usage charges are stated as a function of , and vary with, use (e.g., per connection or per unit of time). Usage charges are billed in arrears.

B. Nonrecurring Charges - A nonrecurring charge applies for each activity, such as an installation or a change, ordered by the Customer and performed by the Company. Charges may differ according to the work activity involved, as specified for each LDMTS offering.

1. Installation Charge - A fixed charge per unit applies when certain LDMTS components are furnished.

2. Service Ordering Charge - A fixed charge Applies for receiving, recording and processing a Customer order for installation, move, or record change related to LDMTS. The service ordering charge varies according to the type of activity involved. When an order contains more then one activity, the highest service ordering charge will apply.

2.5.10. Cancellation, Delay or Change of an Order - The regulations set forth in this section apply for canceling, delaying or changing an order for any LDMTS components except for LDMTS components in Section 3, Conference Services in Section 4, or Other Services in Section 5 to which monthly charges normally apply.

When an order for service is placed, a due date will be established and confirmed with the Customer. If the due date is delayed, the appropriate terms and conditions outlined in A. or B. following apply:

A. Delay of a Due Date by the Customer - A Customer may delay the due date of an order involving the installation or change of LDMTS when:

- The request for the delay is received by the Company prior to the order's due date, and
- The total delay measured from the order's initial due date does not exceed 30 cumulative calendar days.

Orders involving the discontinuance of service may be delayed at any time prior to the due date. There will be no maximum delay period for these orders.

A. Customer having delayed an order for the maximum 30 cumulative calendar day period may not delay the order again. The Customer instead has the option to (1) accept billing for the service ordered, or (2) cancel the order and pay the applicable nonrecurring charge(s) for the service ordered. The billing or cancellation is effective on the 30th cumulative calendar day of the delay.

If the Customer elects to accept billing, the installation will be completed as soon as reasonably practical after the Customer advises the Company.

B. Delay of a Due Date by the Company - The Company will make every reasonable effort to assure that the LDMTS offering ordered is furnished on the due date. However, in some cases a delay in the installation may be unavoidable. If an order is delayed beyond its due date for more than 45 cumulative calendar days and such delay is not requested or caused by the Customer, the Customer may cancel the order without penalty or payment of nonrecurring charges.

C. Cancellation of an Order - A Customer may cancel an order at any time prior to the due date. An order is considered to have been canceled when the Company receives a notification of cancellation from the Customer. Such notification may not be retroactive.

Cancellation Charge(s) will apply as follows, unless caused by Company delay as specified in B. preceding, or otherwise specified in the section applicable to the specific service:

1. When the Customer cancels an order prior to the start of plant work activity, the Service Ordering Charge relative to the activity involved will apply.

2. Installation of a service order is considered to have started when the Company begins to process a service order.

3. When the Customer cancels an order after plant work has started, a charge equal to the costs incurred in such installation will apply, less estimated net salvage. This charge will include the nonrecoverable cost of equipment and material ordered, provided or used, plus the nonrecoverable cost of installation and removal including the costs of engineering, labor, supervision, transportation, rights of way and other associated costs. Estimated net salvage will be based on recoverable cost of reusable equipment and material.

D. Cancellation Involving Special Construction - If a Customer cancels an order which involves special construction, the applicable charges for the special construction are those set forth in Tariff F.C.C. No. 5. Those charges are in addition to any charges which are applicable under this tariff for the cancellation of an order.

2.5.12. Optional Billing Arrangements - When an LDMTS call is not billed to the calling station, the Company offers certain billing options depending on the type of call. These options, which are not available for DIAL-IT 900 Service specified in Section 5 are:

A. Collect Calls - This option allows a call to be billed to the called station, if the charges are accepted by the called party, station, or number. Collect Calls are not acceptable at a public or semi-public coin station. In lieu of a collect call to a public or semi-public coin station, the charges may be billed to a Calling Card as specified in B following, or to a Third Number as specified in C following, or the call may be re-originated from the called station.

B. Calling Card - This option enables a Customer to charge a call to an authorized Calling Card. Calls charged to a Local Exchange Company Calling Card or an AT&T Card will then be included on the LDMTS bill for the Main Billed Account with which the card is associated. Calls charged to a commercial credit-charge card must be made from a suitably equipped telephone. Charges for the LDMTS call will be reflected on the statement issued by the respective commercial credit-charge card institution.

C. Third Number Billing - This option allows a call to be billed to a telephone number identified with a station other than the calling or called one. Charges to be billed to a third number are subject to verification by the Company that they will be accepted at the third number, prior to completion of the call. Other efforts may be undertaken subsequently by the Company, as necessary, to determine responsibility for payment of such calls.

LONG DISTANCE MESSAGE
TELECOMMUNICATIONS SERVICE

SECTION 6 - CUSTOM NETWORK SERVICES

6.1. DESCRIPTION

6.1.1. General - Custom Network Services are offered to meet Customer needs for specialized LDMTS.

6.2. REGULATIONS

6.2.1. General - In addition to the General Regulations in Section 2. preceding, the following apply:

6.2.2. Minimum Payment Period - The minimum payment period for Custom Network Services components is three months except for the Software Defined Network optional features, Custom Switched Network Service, International City Center Service and AT&T MEGACOM Service. The minimum payment period for the Software Defined Network optional features, Custom Switched Network Service, International City Center Service and AT&T MEGACOM Service is one month.

6.2.3. Notice of Discontinuance - The Customer's order to discontinue Custom Network Services must be received by this Company one month prior to the day on which the service is to be discontinued, except for Software Defined Network service for which three months notice is required. Monthly recurring charges apply for that period from the date the Company receives the discontinuance notice or until the requested discontinuance date, whichever is later. The charges will

continue to apply whether or not the Customer continues to use the service.

6.2.4. Allocation of Usage or Charges - The company will not allocate the usage of a Custom Network Service or the charges for such usage and is not responsible for the way the Customer may allocate usage or charges among multiple Users, except when a Customer subscribes to Custom Software Defined Network Service Location Account Billing Option (see Section 6.4.1.B.2.).

6.2.5. Provision of Services - Custom Network Services are fully supported by the Company through engineering, installation and maintenance efforts. The Company will assure that each service functions properly within its specified transmission and switching parameters.

A. Engineering - The Company will engineer to the specifications and parameters of the service provided.

B. Installation - When installation of a component is required it will be installed subject to the availability of installation personnel and equipment. Installations will usually be made during normal working hours.

C. Maintenance - The Company will maintain and repair the services which it provides.

D. Hazardous Locations - A Company-provided access line will not be furnished at a location the Company considers hazardous (e.g., explosive atmosphere environments). In such cases, the Company, if so requested, will terminate the access line at a mutually agreeable alternate location. The Customer will then be responsible for extension of the access line to the hazardous location.

6.2.6. Transfer or Assignment - Custom Network Services may be transferred or assigned to a new Customer, provided that:

A. The Customer of record (former Customer) requests in writing that the Company transfer or assign the service to the new Customer.

B. The new Customer notifies the Company in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service, and (2) the unexpired portion of any applicable minimum payment period(s).

C. The service is not interrupted or relocated at the time the transfer or assignment is made.

D. The Company agrees in writing to the transfer or assignment.

The transfer or assignment does not relieve or discharge the former Customer from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service, and (2) the unexpired portion of any applicable minimum payment period(s).

6.2.7. Multi-Location Calling Plan (MLCP) - Certain Custom Network Services are available as part of the MLCP. The terms and conditions of the MLCP are described in Section 6.9. following.

6.2.8. Use of Custom Network Services For Resale or Shared Use - When Custom Network Services are resold or shared, the

Customer may advise its User that a portion of the Customer's service is provided by this Company. However, the Customer shall not represent that this Company jointly participates in the provision of the Customer's services.

6.4. SOFTWARE DEFINED NETWORK SERVICE

6.4.1. General - Software Defined Network Service (SDN) is a switched telecommunications service which permits a Customer to establish a communications path between two stations by using uniform dialing plans. Customer's stations are connected by access lines to designated AT&T Central Offices as set forth in Section 6.3. preceding. SDN is available as either a Basic or Custom service.

A. Basic SDN - Basic SDN allows the Customer to establish service with no service establishment charge. However, the Customer must commit to a minimum service period of three years. Basic SDN may be upgraded to Custom SDN. The Usage Reduction Plan and Expanded Volume Plan apply to Basic SDN (see 6.4.3.C.7. and 6.4.3.C.8. following). Basic SDN included the following features:

- Station-to-Station Dialing
- Uniform ten-digit on-network or off-network dialing plan
- Customer-selection of Terminating Calls Per location, calls may terminate on-network, on-network and off-network or the combination of on-network, off-network and international.
- International Calling Capability
- Subaccount Identification Code
  Allows the Customer to identify calls via an assigned three-digit code, which is dialed when a call is placed.

B. Custom SDN - Custom SDN allows the Customer to establish service under Options 1, 2, 3, or 4. Options 1 through 3 allow the Customer to establish service at a reduced service establishment charge. However, the Customer must commit to a minimum service period as specified following. The Service Establishment charges for Options 1 through 3 may be paid under a flexible payment plan as specified in 6.4.3.A.1.(a) following. Option 4 allows the Customer to establish service at the standard service establishment charge which may be paid under a flexible payment plan as specified in 6.4.3.A.1.(a) following.

Custom SDN Option	Term of Service
1	3 Years
2	2 Years
3	1 Year
4	1 Month

The Usage Reduction Plan and Expanded Volume Plan apply to Custom SDN Options 1 through 4 (see 6.4.3.C.7. and 6.4.3.C.8. following). Custom SDN includes the following features:

- Available seven-digit, ten-digit or both on-network Dialing Plan (On-network stations using local exchange service access must dial ten digits).
- Uniform ten-digit off-network Dialing Plan
- Station-to-Station Dialing
- International Calling Capability

1. Optional Features - The following optional features are available with Custom SDN:

- Call Screening Authorization Codes
- Seven-Digit International Dialing

- Service Management System (SMS)
- Network Remote Access
- Private Network Interface
- Digital Routing
- Network Intercept Announcements
- Flexible Routing
- Off-Network Overflow On Terminating Busy
- Partitioned Data Base Management
- Access Line Grouping Call Screening
- Location Sharing

In addition, the Custom SDN Customer may select the Location Account Billing Option as specified below:

2. Location Account Billing Option - The Location Account Billing Option allows Custom SDN Customers to include on their networks, under separate bills, locations which operate with the Customer in a common business, using a common brand or trade name, and which (i) the Customer owns or franchises, or (ii) as to which the Customer provides centralized management, oversight or coordination. (For example, a wholesaler could include its retail outlets, a distributor could include its authorized dealers or agents, a manufacturer its authorized service and repair agents, and a national organization its local units to which it provides central direction.) The SDN Customer is responsible for designating the locations that will be included on the network and for placing all service orders to add, delete or change such locations. Each designated location will be billed separately for its service, and the billed entity will be solely responsible for payment to AT&T, and for compliance with all tariff regulations. A Customer may designate a maximum of 6000 locations to receive separate bills under this option. Usage from all such locations will be included in the Customer's usage under the Expanded Volume Plan and the Usage Revenue Plan.

6.4.2. Regulations

A. Mileage Measurements - The mileage for Software Defined Network calls is the distance in airline miles mileage between (1) the rate centers associated with the originating and terminating stations (Schedule A); (2) the V&H coordinates associated with an AT&T Central Office and the rate center associated with a station (Schedule B); or (3) the V&H coordinates associated with an originating and terminating AT&T Central Office (Schedules C and D). Each rate center (determined by NPA centroid or NPA-NXX) or AT&T Central Office has a unique set of assigned vertical and horizontal (V&H) coordinates as described in this Company's Tariff F.C.C. No. 10. These coordinates are used for calculating mileage. Airline mileage is calculated as specified in Tariff F.C.C. No. 10.

B. Deferred Payment Promotion Plan - As a promotional offering, the deferred payment promotion plan allows Customers, who order SDN between February 3, 1989 and May 4, 1989, the option to spread the payment of all non-recurring charges associated with the initial design and installation of SDN, over a 12- or 36-month period. The deferred payment promotion plan is not available when the Customer selects the flexible payment plan (see 6.4.3.A.1.(a) following) associated with Custom SDN. Customers who terminate service before the end of the 12 or 36-month period will be responsible for paying the remaining balance on the installation charges immediately.

C. Trial Offering - Customers may subscribe to either Basic or Custom SDN with a maximum of five access line groupings, on a trial basis for a period of 180 days without incurring any liability for the service establishment charge for Custom SDN or without making a minimum service period

commitment for either Basic or Custom SDN Options 1, 2 or 3. At the end of 90 days, the Customer may increase the number of access line groupings. All other tariff charges are applicable during the trial period. Upon expiration of the 180-day period, unless prior notification is made to AT&T by the Customer, the full terms and conditions of the SDN option selected will become effective.